

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

NEW CASTLE COUNTY

State of Delaware,

Plaintiff,

V.

Charles R. Johnson,

Defendant.

Case No.: 0809021459

Date Submitted: May 4, 2009

Date Decided: May 11, 2009

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MEMORANDUM OPINION

Trial in the above captioned matter was held in the Court of Common Pleas, New Castle County Criminal Division on Monday, May 4, 2009. Following the receipt of all documentary evidence and sworn testimony, the Court reserved decision. This is the Court's Final Decision and Order.

(i) The Facts

The defendant was charged by the Attorney General filed with the Clerk of the Court by an Amended Information, one Count Attempted Misdemeanor

Theft in violation of 11 *Del.C.* §531 of the Delaware Code.¹ The Information alleges, *inter alia* that... “on or about the 20th day of September 2008, in the County of New Castle, State of Delaware, [the defendant] did attempt to take with intent to appropriate, property consisting of a campaign sign, belonging to State Representative Earl Jacques (“Jacques”), and valued at less than \$1,000.00, which acts, under the circumstances as he believed them to be, constituted a substantial step in the course of conduct planning to culminate in the commission of Theft Under \$1000.00 in violation of Title 11, §841(a) of the Delaware Code of 1974 as amended.”

At trial the Attorney General called several fact witnesses. The alleged victim, Jacques presented testimony. He is a State Representative employed by the State of Delaware in the 27th district, Bear, Glasgow. On November 6, 2008 he was elected State Representative in the General Assembly. He was previously Chief of Staff for the Delaware National Guard and held that position until September 10, 2008 when he was elected to the State House of Representatives.

During his campaign Jacques placed in his district campaign signs which he personally paid for and installed. Jacques installed three (3) different types of sign; a 4’ x 8’ model; a 4’ x 4’ model and yard signs that were approximately

¹ The Court received one documentary evidence at trial by defendant which was a picture of the instant sign taken on October 12, 2008.

24" x 4'. As indicated, Jacques personally paid for the signs with personal funds and installed a sign on Route 896 and Porter Road. The model was the 4' x 4' model and was located in New Castle County, Delaware. Representative Jacques purchased and installed had two (2) other political signs in the other corners of the intersection which were the 4' x 4' models. All signs were installed in New Castle County during July and August, 2008, prior to the State election.

Jacques testified that the 4' x 4' sign cost approximately \$400.00 which involved printing costs for the sign; plywood glued to the back of the sign; as well as costs for purchase of wooden posts. All signs were personally installed by Jacques and/or his campaign staff. The plywood installed to the back of the signs is approximately 3-4" and it takes approximate 3 – 4 people to install and/or take down the signs because of the weight and size of the signs.

On or about September 20, 2008 at approximately 4:00 p.m., Jacques and his wife were campaigning and were on their way home driving on Porter Road in New Castle County. Jacques observed Mr. Charles Johnson ("Johnson") at that location. Jacques identified Johnson in the courtroom. Jacques testified that Johnson's car was parked on the shoulder on Porter Road and Johnson was standing near a 4' x 8' sign installed at the intersection by Jacques. Jacques observed a wrench in Johnson's hands and Johnson allegedly taking down the political sign. Johnson was observed taking a bolt out of the

back of the sign. Jacques testified that had never met Johnson before that day. Jacques then pulled up on the shoulder behind the defendant's truck.

Jacques testified that the defendant told him, "I'm taking down the sign to clear the area for DELDOT." There were no car markings indicating he was a DELDOT employee and the defendant produced no identification that he was employed by DELDOT. The defendant also allegedly told Jacques that he was clearing all the signs. When he approached the defendant Jacques testified that there was one bolt loose on the sign, but the defendant then stopped taking down the sign.

Jacques called 9-1-1 and asked to speak with the State Police. He then traveled to Troop 2 to file a police report. Jacques spoke with Corporal Joseph Parker ("Corporal Parker") of the Delaware State Police and later swore out a warrant for Johnson because the attempted theft for a misdemeanor was not committed in the police officer's presence.

Corporal Parker testified for the State. He is a Corporal Grade 2 for the Delaware State Police and has been a uniformed patrol officer since July 21, 1995. Corporal Parker was called on September 20, 2008 and spoke with Jacques. He also made the arrest of defendant on October 19, 2008 after Jacques personally swore out the subject warrant for misdemeanor theft.

The defendant presented his case-in-chief and recalled Mr. Earl Jacques.

Jacques testified that he does not own the subject property as the sign that is installed on DELDOT's right of way. Jacques was in the truck with his wife, but she was not present at trial and was not called as a witness by the State. They both went to Troop 2 on the date set forth in the Information. Jacques believed the defendant had both a wrench and/or screwdriver in his possession and was taking bolts out of the sign when he arrived on the scene. Jacques also testified that the defendant gave him his driver's license. Jacques then located the defendant's tag off the back of his motor vehicle and wrote it down. Upon questioning by the defendant, the reason Jacques informed the police that his sign was being stolen was that the defendant didn't own the sign; the defendant didn't pay for the sign; and the sign was installed legally on a DELDOT right-of-way in accordance with DELDOT Policies, Rules and Regulations.

The defendant also recalled Corporal Parker, duly sworn, who reiterated the reason the State Police didn't personally file the charging documents was that it the offense was misdemeanor not committed in his presence. For that reason Corporal Parker testified he did not visit the scene and/or inspect the subject property.

Johnson was called by the defense. He is sixty-six (66) years old and resides at 102 Countryside Lane in New Castle. Johnson remembers the incident on September 20, 2008 on Route 896 when he was at the scene

picking up a bungee cord and placing it in his truck. He had a Swiss army knife in his possession and was cutting ropes off the bungee cord.

Defendant testified Jacques came up and asked him, “Who are you working for?” Allegedly Jacques also told him “I lost signs that were stolen from me,” Jacques also appeared to be “very upset”. The defendant also testified that he wasn’t doing anything to Jacques’s political sign but was standing near the sign when Jacques appeared. Defendant testified that he didn’t take any bolts out of the sign. Johnson testified he never showed Jacques his driver’s license.

On cross-examination Johnson testified that the campaign signs are approximately ten (10) feet off the black top and he testified “I was pretty close to the signs” installed on the right-of-way. The defendant also testified that his car was on the shoulder. This location, according to Johnson, was approximately ten (10) feet away from the sign.

On rebuttal testimony by the State, Jacques testified his sign was approximately twenty (20) feet from the roadway and he believed that the defendant was taking a bolt out of the sign. He admitted the item in Johnson’s possession could have been, in fact, a Swiss army knife, but in event some type of tool. Jacques testified he came back later and tightened the bolt on the back of the sign which he believed the defendant had loosened.

(ii) The Law

The State has a burden of proving each and every element of the subject offense beyond a reasonable doubt. 11 *Del.C.* §301. *State v. Matushefske*, 215 A.2d 443 (Del. 1965).

“a reasonable doubt is not a vague, whimsical or merely possible doubt ‘but such a doubt as intelligent, reasonable and impartial men may honestly entertain after a conscious consideration of the case.’” *Matushefske*, 215 A.2d 445.

The State also has a burden of proof beyond a reasonable doubt that jurisdiction and venue has been proven as elements of the offense. 11 *Del. C.* § 232. *James v. State*, 377 A.2d 15 (Del. 1977). *Thornton v. State*, 405 A.2d 126 (Del. 1979).

The Court as trier of fact is the sole judge of the credibility of each fact witness. If the Court finds the evidence presented to be in conflict, it is the Court’s duty to reconcile these conflicts, if reasonably possible, as to make one harmonious story of it all.

If the Court cannot reconcile these differences, the Court must give credit to that portion of the testimony, which, in the Court’s judgment is the most worthy of credit and disregard any portion of the testimony which the Court’s judgment is unworthy of credit.

In doing so, the Court takes into consideration the demeanor of the witness, their apparent fairness in giving their testimony, their opportunities and hearing and knowing the facts about which they testified, and any basis or interest they may have concerning the nature of the case.

The subject statute, 11 *Del.C.* §841(a) provides as follows:

(a) A person is guilty of theft when the person takes, exercises control over or obtains property of another person intending to deprive that person of it or appropriate it. Theft includes the acts described in this section, as well as those described in §§ 841A--846 of this title.

(iii) Opinion And Order

The Court finds that the documentary and oral evidence, both quality and quantity, in this trial appears to be equally balanced. The State's case, cast in its most favorable light is either the defendant did, or did not, loosen one bolt on the political sign owned by Jacques. This fact was disputed at trial by the defendant. In fact, the defendant took the stand and denied all the instant charges. The trial record indicates that this is not a case where personal property was actually removed from the scene, taken away and/or maliciously destroyed. What appears to be the crux of the State's case, which is again disputed in the record and equally balanced, is that one bolt was removed from the political sign owned by Johnson.

At trial, on rebuttal testimony Representative Jacques was candid that perhaps the tools in Johnson's hands were not, in fact, pliers or a screwdriver but a Swiss army knife as defendant articulated when he told the Court he was cutting a bungee cord near the sign on the public road.

In any event, this Court cannot make a finding beyond a reasonable doubt, 11 *Del.C.* §301, that the defendant in fact, as set forth in the Information, attempted to "take, exercise control over or attain the property of another person intending to deprive that person or appropriate it;" or that as the charging documents alleged, "a substantial step in the course of conduct planning to culminate in the commission of Theft Under \$1,000.00 [was made by defendant] in violation of Title 11, §841(a) of the Delaware Code of 1974 as amended.

At best, the Court can find that the defendant loosened one bolt which is a disputed evidentiary fact which is to be equally balanced as a matter of law, and fact, and not proven beyond a reasonable doubt. 11 *Del.C.* §301.

For this reason, the Court adjudicates the defendant **Not Guilty**.

IT IS SO ORDERED this 11th day of May, 2009.

John K. Welch
Judge

/jb
cc: Juanette West, Case Manager
CCP, Criminal Division